UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONOVAN J. FOSTER,

Plaintiff–Appellant,

v.

UNITED STATES OF AMERICA,

Defendant–Appellee.

Case No. 24-140

MOTION FOR JUDICIAL NOTICE OF ONGOING ECONOMIC RETALIATION AND PROCEDURAL SABOTAGE LINKED TO FEDERAL TORT CLAIMS ACT APPEAL

INTRODUCTION

Pursuant to Federal Rule of Evidence 201, Federal Rule of Appellate Procedure 27, and Ninth Circuit Rule 27-1, Appellant Donovan J. Foster

respectfully moves this Court to take judicial notice of key facts bearing on the procedural, constitutional, and economic context of this appeal. Specifically, Appellant requests that this Court recognize:

1. That substantial economic interference has occurred following the filing of this FTCA appeal, targeting Appellant's lawful business entity;

2. **That such interference includes the placement of Appellant's company, Gio Beverly Hills LLC, on the Federal Do Not Pay (DNP) list, which directly resulted in the denial of access to federal small business capital;**

3. **That these actions were taken without any adjudicative process, statutory basis, or notice to the affected party;**

4. **That the timing of this exclusion correlates precisely with the pendency of this appeal, raising legitimate concerns about retaliatory governmental conduct;**

5. That the economic harm from this exclusion has been calculated in good faith at $24,482,503.95, based on anticipated contract performance, disabled-veteran business enterprise (DVBE) opportunities, and federal program access projections denied as a result.

These facts are not offered for purposes of evidentiary adjudication or monetary relief at the appellate level. Rather, they are submitted so that the full constitutional and procedural stakes of this litigation can be appreciated, preserved, and considered by the Court in evaluating whether jurisdiction under the Federal Tort Claims Act (FTCA) is proper, and whether further remand would be just or efficient.

LEGAL BASIS FOR JUDICIAL NOTICE

Federal Rule of Evidence 201(b) provides that a court may take judicial notice of a fact that is not subject to reasonable dispute because it:

1. Is generally known within the trial court's territorial jurisdiction; or

2. **Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.**

Judicial notice is appropriate on appeal where the facts in question:

- **Arise after the trial court record closed but bear directly on the continuing viability or constitutional scope of the case;**
- **Serve to preserve structural harms or due process failures that color the judicial process itself;**
- Establish the existence of parallel governmental conduct that reinforces the need for judicial oversight.

Ninth Circuit precedent supports judicial notice for post-record governmental activity tied to constitutional litigation. See:

- United States v. Ritchie, 342 F.3d 903, 909 (9th Cir. 2003);
- Lee v. City of Los Angeles, 250 F.3d 668, 688–89 (9th Cir. 2001);
- Karnoski v. Trump, 926 F.3d 1180, 1196 (9th Cir. 2019).

FACTUAL BACKGROUND FOR JUDICIAL NOTICE

Appellant Donovan J. Foster is a 100% disabled United States military veteran prosecuting this appeal under the Federal Tort Claims Act for injuries arising from negligent loss and/or misclassification of military medical records by the VA, which caused a nine-year delay in diagnosis of a serious health condition.

To lawfully and therapeutically re-enter economic life within the constraints of his disability, Appellant caused to be formed Gio Beverly Hills LLC, a rehabilitative limited liability company owned by GBH Trust. The company was created as a disabled-veteran-owned enterprise with the intent to participate in federal and state economic programs, including:

- SBA-backed loan programs;
- DVBE set-asides;

- Department of Commerce capacity building contracts;
- Private sector opportunities dependent on federal registration.

On or about February 11, 2025, while this appeal was pending, Gio Beverly Hills LLC received notice that it had been denied SBA participation due to its presence on the Federal Do Not Pay (DNP) list—a Treasury-operated list meant to exclude ineligible entities from receiving federal disbursements.

Upon investigation, it was discovered that the DNP flag had been initiated not by any court or disqualifying federal action, but by the California Department of Social Services (CDSS)—an executive agency of the State of California. The company was given:

- No warning;
- No hearing;
- No findings of fraud, misconduct, or ineligibility;
- No procedural mechanism for appeal or rebuttal.

This blacklisting occurred within weeks of the docketing of this FTCA appeal, and has had a chilling effect on Appellant's ability to lawfully fund, operate, and defend this litigation. The denial resulted in immediate economic exclusion from federal capital programs—a form of collateral suppression that runs afoul of due process and calls into question the structural integrity of sovereign litigation.

RELEVANCE TO THE COURT'S JURISDICTIONAL INQUIRY

These facts are not submitted as new causes of action, nor do they request monetary relief here. Rather, they bear on three issues critical to the Court's jurisdictional analysis:

1. **They establish the gravity and persistence of harm flowing from the VA's original tort, including harm to entities aligned with the Appellant;**

2. They demonstrate the presence of state-federal interference, arising not from formal proceedings but from systemic retaliatory conduct against a federal litigant;

3. They underscore the urgency of appellate resolution now—not through remand—because the judicial delay enables continued injury, economic suppression, and loss of public access rights.

This is not merely an appeal. It is a live constitutional battlefield where the FTCA's promise of accountability is being tested not just in the courtroom, but in the lived experience of those daring to invoke it.

CONCLUSION

Appellant respectfully requests that the Court:

1. **Take judicial notice that Appellant's affiliated business, Gio Beverly Hills LLC, was denied SBA access following improper**

listing on the Federal Do Not Pay list, without adjudication, during the pendency of this appeal;

2. Take judicial notice that this exclusion arose from an unexplained designation by the California Department of Social Services, imposed without process or recourse;

3. Take judicial notice that the resulting damages have been calculated at over $24 million, based on foregone economic opportunity and confirmed operational exclusion;

4. Consider these facts not as evidence of liability, but as structural context that underscores the constitutional necessity of preserving FTCA jurisdiction and deciding this appeal without remand.

This litigation has not occurred in a vacuum. It is now surrounded by forces that the judiciary alone can neutralize. To take notice is not to decide the facts—but to honor the constitutional terrain on which they unfold.

Respectfully submitted,

/s/ Donovan J. Foster

Appellant / GBH Trust Fiduciary

April 23, 2025

Los Angeles, California

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONOVAN J. FOSTER,

Plaintiff–Appellant,

v.

UNITED STATES OF AMERICA,

Defendant–Appellee.

Case No. 24-140

DECLARATION OF DONOVAN J. FOSTER IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

I, Donovan J. Foster, declare and state as follows:

1. I am the Appellant in the above-captioned matter, currently pending before the United States Court of Appeals for the Ninth Circuit. I make this declaration in support of my Motion for

Judicial Notice, and based on personal knowledge unless otherwise stated.

2. I am a 100% service-connected disabled veteran of the U.S. Armed Forces. I am also the fiduciary of GBH Trust, which formed Gio Beverly Hills LLC as a therapeutic, non-distributing commercial entity to assist in my lawful economic rehabilitation following catastrophic medical harm inflicted by the VA.

3. On or about February 11, 2025, while my FTCA appeal in this matter was pending, I learned that Gio Beverly Hills LLC had been denied access to federal SBA programs based on the company's presence on the Federal Do Not Pay (DNP) list.

4. That DNP designation was not based on any adjudicated finding of ineligibility, fraud, or disqualification. It was instead initiated by the California Department of Social Services, and entered into a federal exclusion system without my notice, opportunity to rebut, or access to an appeals process.

5. This action resulted in the immediate financial exclusion of Gio Beverly Hills LLC from government contracts and small business capital, including DVBE pathways and procurement programs, at the precise time I was pursuing legal redress under the Federal Tort Claims Act.

6. As a result of this blacklisting, projected earnings, federal contract performance, and private investment were lost, causing measurable harm. A good-faith financial model calculates those damages at $24,482,503.95 over the lost operational timeline.

7. I am not asking this Court to award monetary relief here. I am requesting that the Court take judicial notice of these publicly verifiable, post-record facts in order to understand the constitutional and structural significance of this appeal, and to preserve those facts for any further proceedings.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 23, 2025, in Marina Del Rey, California.

/s/ Donovan J. Foster

Donovan J. Foster

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONOVAN J. FOSTER,

Plaintiff–Appellant,

v.

UNITED STATES OF AMERICA,

Defendant–Appellee.

Case No. 24-140

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY GIO BEVERLY HILLS LLC IN SUPPORT OF APPELLANT

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Ninth Circuit Rule 29-3, Gio Beverly Hills LLC, by and through its

organizing body GBH Trust, respectfully moves for leave to file the accompanying Amicus Curiae Brief in Support of Appellant Donovan J. Foster.

I. IDENTITY AND INTEREST OF AMICUS

Gio Beverly Hills LLC is a private, trust-controlled entity organized to provide rehabilitative and therapeutic commercial engagement to Appellant, a 100% disabled veteran. The entity was established as a lawful structure to enable productivity and economic viability following life-altering VA-inflicted injury—injury that is now the subject of this FTCA appeal.

In February 2025, the business was blacklisted from federal capital access programs via placement on the Federal Do Not Pay (DNP) list, based on a referral from the California Department of Social Services. This occurred without adjudication or due process and resulted in the denial of SBA funding.

The action was taken after the Appellant filed his federal tort claim and while this appeal was pending. This timing and effect establish that the

consequences of the VA's original tort—and the federal response to litigation—extend to Appellant's support systems. Thus, Amicus has direct factual and constitutional interest in the resolution of this matter.

II. NECESSITY OF AMICUS PARTICIPATION

This brief offers:

- A doctrinal map distinguishing FTCA claims from VJRA-shielded matters;
- A constitutional argument regarding the misuse of § 511 to create impunity;
- A real-world example of extrajudicial state-federal retaliation against entities associated with pro se FTCA litigants;
- A perspective not currently represented by the parties, grounded in third-party economic harm and institutional sabotage.

No party's counsel authored the brief. No party contributed funds for its preparation. The government has not consented. Therefore, leave is required and properly sought.

III. REQUEST FOR LEAVE

This motion is timely. Amicus has acted swiftly after material developments in the appeal (including the filing of the opening brief). Granting leave will aid the Court's understanding and protect its decisional space from doctrine distortion.

For the foregoing reasons, Gio Beverly Hills LLC respectfully requests leave to file the attached Amicus Curiae Brief in support of Appellant and in defense of constitutional tort access.

Respectfully submitted,

/s/ Donovan J. Foster

Managing Agent, GBH Trust

Organizer, Gio Beverly Hills LLC

April 23, 2025

Marina Del Rey, California

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONOVAN J. FOSTER,

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UNITED STATES OF AMERICA,

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Case No. 24-140

BRIEF OF AMICUS CURIAE GIO BEVERLY HILLS LLC IN SUPPORT OF APPELLANT AND IN DEFENSE OF CONSTITUTIONAL ACCESS TO FEDERAL TORT CLAIMS

INTEREST OF AMICUS CURIAE

Gio Beverly Hills LLC, a non-distributing, therapeutically-oriented private entity established by GBH Trust, submits this brief in defense of constitutional access to federal tort forums. The entity exists solely to provide Donovan J. Foster, a 100% disabled veteran, with a channel for rehabilitative economic participation following injuries sustained through VA recordkeeping negligence resulting in a catastrophic delay in medical diagnosis.

Since the docketing of this appeal, Gio Beverly Hills LLC has been blacklisted without notice from SBA programs via an improper referral to the Federal Do Not Pay (DNP) list—a move initiated by the California Department of Social Services, with no adjudication, and concurrent with active federal litigation against the United States.

Amicus files this brief to reinforce why this action belongs firmly within the scope of the Federal Tort Claims Act (FTCA) and why the government's invocation of 38 U.S.C. § 511 to bar the claim is not only legally unsound but institutionally corrosive.

SUMMARY OF ARGUMENT

The VA's misclassification or loss of Appellant's medical records caused a nearly decade-long diagnostic delay—a tort, not a policy dispute. The government now invokes § 511 of the Veterans' Judicial Review Act (VJRA) to claim immunity, suggesting this tort is inherently unreviewable. That argument is:

1. **Foreclosed by binding Ninth Circuit precedent, including Tunac, Littlejohn, and Thomas v. Principi;**
2. Inconsistent with the statutory limits of § 511, which bar judicial review only of actual VA benefits decisions—not tortious administrative or medical misconduct;
3. Constitutionally problematic, implicating due process, equal protection, and separation-of-powers violations;
4. Rebutted by evidence of extrajudicial retaliation, including unlawful interference with Appellant's economic ecosystem via DNP-based SBA exclusion.

This is not a benefits dispute. It is a sovereign-inflicted harm. This Court should resolve the jurisdictional question now, not remand it, to preserve constitutional governance and judicial efficiency.

ARGUMENT

I. Appellant's Claim Is a Justiciable FTCA Tort Based on Independent Negligent Conduct

The FTCA (28 U.S.C. § 1346(b)) allows suits for:

"personal injury... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."

Mr. Foster alleges that VA employees lost, mislabeled, or failed to retrieve his service medical records, resulting in unreasonable delay in diagnosis from any competent medical provider not solely the Department of Veterans Affairs medical providing arm of a serious condition. This is a tort rooted in non-benefits administrative conduct—

namely, record preservation, access, and continuity of care—all actionable under the FTCA.

This claim neither requires review of a VA decision nor challenges the merits of any benefit awarded or denied. No administrative pathway exists to adjudicate these recordkeeping failures. Thus, § 511 is inapplicable by its own terms.

II. Ninth Circuit Doctrine Confirms That § 511 Does Not Bar FTCA Claims for Medical or Administrative Negligence

In Tunac v. United States, 897 F.3d 1197 (9th Cir. 2018), the Court held that § 511 does not bar an FTCA claim where VA staff failed to prevent a suicide, rejecting the government's argument that suicide prevention fell within VA "care protocols."

"[The] district court had jurisdiction... because the VA's alleged negligence was not in administering benefits, but in the failure of its staff to act competently."
Tunac, 897 F.3d at 1203.

In Littlejohn v. United States, 321 F.3d 915 (9th Cir. 2003), the plaintiff's FTCA claim for delayed diabetes diagnosis by VA doctors was allowed despite proximity to benefits adjudication:

"Littlejohn's claim is a tort claim... The potential effect on benefits is not enough to trigger § 511."
Id. at 921.

And in Thomas v. Principi, 394 F.3d 970 (D.C. Cir. 2005), the court distinguished between medical malpractice torts and benefit disputes, ruling that constitutional and tort-based challenges survive even in a VJRA context.

Mr. Foster's claim falls squarely within these cases. It is not precluded because it arises from a failure to maintain continuity of care—not a denial of benefits.

III. DOJ's Interpretation of § 511 Would Create a Constitutionally Impermissible Jurisdictional Abyss

The government's view—that all torts committed in the context of VA systems are unreviewable under § 511—would:

- **Convert the VJRA into a sovereign immunity cloaking device;**
- Eviscerate the FTCA's congressional purpose;
- Deny veterans the same rights afforded to every other tort victim;
- Violate Fifth Amendment due process, as federal employees could inflict harm without judicial remedy;
- Create a separation-of-powers breach, as executive agencies could self-declare entire categories of torts unreviewable;
- Constitute unequal protection, leaving one subclass of citizens (veterans) without access to civil recovery available to all others.

This is not judicial deference. It is doctrinal surrender to agency overreach.

IV. The Economic Retaliation Against Appellant's LLC Confirms the Need for Judicial Oversight

On February 11, 2025, the SBA rejected Gio Beverly Hills LLC's loan application after the entity was flagged on the DNP list. This occurred:

- During the pendency of a federal FTCA appeal against the United States.

This is not collateral harm—it is procedural throttling of a litigant's financial viability. It confirms the stakes: without judicial check, agencies will attack.

This extrajudicial sabotage forms an APA violation (5 U.S.C. §§ 701–706), a facial Fifth Amendment violation for denial of liberty and property interests without due process, and a Bivens-adjacent constitutional tort, even if not pleaded as such.

The Ninth Circuit must acknowledge this conduct—not as damages evidence, but as jurisdictional context.

V. The Ninth Circuit Should Resolve Jurisdiction Now to Avoid Serial Institutional Harm

The District Court dismissed on jurisdictional grounds. The facts are undisputed. The legal doctrine is mature. The question is purely legal: does § 511 bar this tort?

Remand serves no judicial function. As this Court held in Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998):

"Where the record is fully developed and the legal issues are clear, remand is unnecessary."

Further delay exposes Appellant to:

- Additional retaliation,
- Economic destabilization,
- and the procedural erosion of the FTCA.

This Court must declare once and for all that § 511 does not immunize medical torts or medical recordkeeping negligence from federal jurisdiction.

CONCLUSION

The FTCA was not designed to protect only some Americans from government torts. It was enacted to hold the sovereign answerable for the injuries it causes.

Here, the United States inflicted injury. It now seeks to reclassify that injury as "policy" and/or a benefits decision made by the Secretary. This is not statutory interpretation—it is definitional manipulation.

Amicus urges this Court to:

1. **Reject § 511 as a bar to Appellant's FTCA claim;**
2. **Affirm jurisdiction and remand only for discovery and adjudication;**
3. **Recognize that extrajudicial interference has already occurred—and that further delay invites constitutional harm.**

Respectfully submitted,

/s/ Donovan J. Foster

Trustee, GBH Trust

Organizer, Gio Beverly Hills LLC

April 23, 2025

Los Angles, California

CERTIFICATE OF SERVICE

I certify that on April 23, 2025, I electronically filed the following documents as part of a consolidated PDF submissionin the above-captioned appeal:

- **Motion for Judicial Notice of Economic Retaliation and Procedural Sabotage**
- **Declaration of Donovan J. Foster in Support**
- **Motion for Leave to File Amicus Curiae Brief**
- **Brief of Amicus Curiae Gio Beverly Hills LLC in Support of Appellant**

All documents were filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the CM/ECF system. All parties registered to receive electronic notice will be served via ECF.

Executed on April 23, 2025 in Marina Del Rey, California.

/s/ Donovan J. Foster

Appellant / Declarant